No. 2525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY
(a corporation),
Plaintiff in Error.

vs.

M. E. DITTMAR,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

L. A. REDMAN,
Attorney for Plaintiff in Error.

Filed this ..... *day of March, 1915.*

FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*

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Pursuant to permission given by the Court upon the oral argument of this cause, we submit the following reply to several points made in the brief of plaintiff, and not covered by the argument made in defendant's opening brief.

I.

Plaintiff contends that this Court can not "review the evidence" in the case because there was no "request" made at the close of the trial for judgment in favor of the defendant. But, in the first place, we insist that there was a "request" made

for judgment for defendant. It appears from the record (p. 156) that the case was "argued" on behalf of defendant. An "argument" necessarily involves a "request" for judgment. An "argument" is not only a "request", but a statement of the grounds of the "request" as well. It would be preposterous, we submit, to hold that if the case was submitted for decision with a simple "request" for judgment, this Court could "review the evidence", but that it cannot do so if the case was "argued", that is to say, if the necessarily implied "request" for judgment was fortified by the grounds and reasons therefor. The practice of "requesting" judgment where the case is tried without a jury has never prevailed in this Circuit, and we apprehend that any trial Judge here, to whom such a "request" was preferred would entertain it with a smile. And, of course, a ruling upon such "request" must necessarily be deferred, where as here a case is taken under advisement, until the case is decided. The Court would not by denying the "request" forestall its future decision. And furthermore we submit that what may be done indirectly may be done directly. A Court would stultify itself by holding that it had no jurisdiction to determine the purely legal question of the sufficiency of the evidence to support the judgment, but that it could do this very thing where the device was adopted of requesting judgment and excepting to the refusal of the Court to grant the request. This would savor of judicial trickery and it cannot be

assumed that such a thing was intended by the Act of Congress.

It is obvious that the real ground for review is not that judgment has been "requested" but because the question of the *sufficiency* of the evidence (not of its *weight)* presents a *pure question of law.*

The Public Utilities Act of this state provides that the findings of the Railroad Commission on questions of fact shall be final and not subject to review. But this provision was held by the Supreme Court in *Del Mar Water &c. Co. v. Eshleman et al.,* 167 Cal. 666 (677), not to preclude inquiry as to whether or not there was evidence to sustain the findings of the Commission, that question being "purely one of law".

In *Enman v. Dalziel & Co.,* Court of Sessions Cases (1911-12), May 4, 1912, p. 966, the Lord President said:

> "Now, as your Lordships well know it has been conclusively settled by decisions of the House of Lords and of this court that although such appeals are by statute limited to questions of law, nevertheless they are competent when the question is whether such findings as these can be supported by the evidence submitted, for that has been held to be a question of law. The criterion is whether anyone could reasonably have come to that conclusion."

To the same effect see also

Condron v. Gavin Paul & Sons, Ltd., 41 Scot. Law Rep. 33, Court of Sessions Cases November 5, 1903;

Leishman v. William Dixon, Ltd., Court of Sessions (1909-10) February 10, 1910;

McCaffrey v. Great Northern Ry. Co., 36 Irish Law Times Reports 27;

United Collieries, Ltd. v. McGhie, Vol. VI Court of Sessions Cases (5th Series) 809-11;

Dailly v. John Watson, Ltd., Vol. II Court of Sessions Cases (5th Series) 1044-7;

O'Hara v. Cadzow Coal Co. Ltd., Vol. V Court of Sessions Cases (5th Series) 439-440, 443-444.

In *In re Buckley,* 105 N. E. 979, the Court said:

> "There is no appeal from the finding of the Board upon a question of fact where there is any evidence to support it; but where as here the evidence is all reported the question whether it is sufficient to support the finding is one of law and may be revised here."

In *International Harvester Co. v. Industrial Commission,* 147 N. W. 53, the Court said:

> "The rule in certiorari cases is that if in any reasonable view of the evidence it will support the conclusion arrived at, such conclusion will not be disturbed for want of support in the evidence. If, however, the finding has no support in the testimony there was no jurisdiction to make it."

The case of *Streeter v. Sanitary District of Chicago,* 133 Fed. 124, cited by plaintiff, is not in point because as appears from the opinion in that case, the

> "request in our judgment goes to the weight or preponderance of evidence, not to the question

> whether the evidence making for the plaintiff is adequate, unimpeached and without conflict. It demands a weighing of the evidence. It does not proceed upon the ground that there is a total lack of evidence to support a contrary finding".

Nor is the case of *Blanchard v. Commercial Bank of Tacoma,* 75 Fed. 249 in this Circuit, cited by plaintiff, in point, because in that case also, as stated by the Court in its opinion, it was necessary to "weigh the evidence and determine the preponderance thereof". Here the attack upon the judgment *does* "proceed upon the ground that there is a total lack of evidence to support a contrary finding".

II.

But a determination of the question just discussed is not necessary to a disposition of the appeal herein because of the reservation of exceptions to the admissibility of the evidence relating to the alleged "reasonable value" of plaintiff's services. If as we contend such evidence was inadmissible, that is to say that it was immaterial what the reasonable value of plaintiff's services were, because upon the facts proved the defendant was not liable for such "reasonable value" then the judgment must be reversed *upon the exceptions taken to the rulings of the trial Court admitting such evidence.* Of course the determination of this question incidentally involves the consideration of the question of the sufficiency of the evidence, but even if the question of the suf-

ficiency of the evidence cannot be reviewed by the Court as an independent proposition, it necessarily can be where as here it is involved in a ruling made by the lower Court "in the progress of the trial of the cause" and excepted to.

The statement made in plaintiff's brief (p. 4) that no particular grounds of objection to the testimony were specified, is incorrect. In each instance the grounds of objection were that the evidence "sought to be elicited was immaterial, irrelevant and incompetent, and that no proper foundation had been laid for it" (pp. 44, 49-50). And moreover the grounds of objection were elaborated in the argument upon the merits of the case, because as above stated, the objections to the admissibility of evidence as to the reasonable value of services went to the heart of the controversy, which was, whether or not plaintiff was entitled to recover upon a *quantum meruit;* and this question was briefed in the lower Court (p. 33). The rulings upon the evidence made at the trial were *pro forma* merely. If judgment went for defendant the error in admitting the evidence was cured. A judgment for plaintiff, however, after argument in opposition to the claim that plaintiff was entitled to recover upon a *quantum meruit* necessarily implies familiarity by the Court with the grounds of objection urged to the admissibility of testimony relating to the reasonable value of plaintiff's services. For these reasons we submit that there is no merit in the claim that the objections to the evidence were not sufficiently explicit.

None of the cases cited by plaintiff in his brief in support of his claim upon this proposition are in point. They were all cases where objections were made without any grounds therefor being given, and moreover were not objections going to the vital points in controversy.

III.

On pages 21 *et seq.* of his brief plaintiff contends that the objection that there was a variance between his pleadings and proof can not be raised in this Court because no such objection was made in the Court below. But the point urged by us in the Court below, as well as here, is not one of variance between the pleadings and the proof curable by amendment, but the point made is that the evidence does not justify a recovery by the plaintiff *upon any theory.* In other words our contention is that defendant is entitled to judgment *assuming that the facts proved had been pleaded.* The variance of which we complain is not a variance between a cause of action pleaded, and a cause of action proved, but it is a variance between a cause of action pleaded and proof which fails to establish the cause of action pleaded or any other cause of action.

Dated, San Francisco,
March 22, 1915.

Respectfully submitted,

L. A. REDMAN,
Attorney for Plaintiff in Error.